No. 3032

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INCORPORATED,
Plaintiff in Error,

vs.

LEONARD EVERETT,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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PERNAU-WALSH PRINTING CO.

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I.

Statement of Facts.

The facts of the case are, for all practical purposes, undisputed. The Defendant in Error (hereinafter called the plaintiff) is an American citizen residing in Shanghai, China, and engaged in the shipping business there.[1] The Plaintiff in Error (hereinafter called the defendant) is a corporation organized under the laws of the State of California and having its principal place of business in San Francisco;[2] the defendant, therefore, is an American citizen. During all the times involved in the action the defendant was a common carrier of freight between the

1. R. pp. 2, 13.
2. R. pp. 2, 13.

Orient and San Francisco.[3] It had an agent in Shanghai, China, through which it solicited business.[4] The agent was a British corporation,[5] and it is about this circumstance that the main defense of the defendant turns. The defendant had chartered the American steamer "Yucatan",[6] and its agent in Shanghai had advertised in the public press of Shanghai between April 16, 1916, and May 5, 1916, that the "Yucatan" would be put on the berth at Shanghai, and that applications for freight space for a voyage to San Francisco would be entertained.[7] Prior to the arrival of the "Yucatan" at Shanghai the plaintiff applied to the agent of the defendant for freight space.[8] At first the agent *unconditionally* refused to allot any freight space to the plaintiff,[9] notwithstanding that there was at the time of plaintiff's application considerable freight space undisposed of so as to have permitted the acceptance of plaintiff's application had the defendant's agent been minded to accept it.[10] Later, however, the agent modified its refusal, and agreed to accept plaintiff's application and to provide freight space for him *upon condition that his application be passed by the British Consul at Shanghai.*[11] During all of this time the defendant's agent was accepting applications of other shippers without reservation or condition.[12] The plaintiff refused to recognize

3. R. pp. 4, 14.
4. R. pp. 3, 13.
5. R. pp. 3, 14, 15.
6. R. pp. 2, 13.
7. R. pp. 3, 13.
8. R. pp. 3, 13.
9. R. pp. 4, 14.
10. R. pp. 4, 14.
11. R. pp. 5, 14.
12. R. pp. 4, 14, 29.

the *conditional* acceptance of his application because as an American citizen dealing with an American charterer of an American vessel he believed the condition to be unlawful, and further because he knew, and *the agent knew,* that, for reasons presently to be mentioned, the British Consul would not approve his application.[13]

The plaintiff demanded an unconditional acceptance of his application, but the defendant, through its agent, refused to comply with such demand.[14]

The cargo offered for shipment by the plaintiff came into the plaintiff's possession from German subjects who were his clients.[15] It is alleged in the answer of the defendant[16] that the cargo was in fact *owned* by German subjects, but there is no proof of that fact. It is admitted by the plaintiff that the goods were delivered to him by German subjects, and that he received his instructions with respect thereto from German subjects,[17] but as to the ownership of the cargo the record is silent.

By orders in council and by rules, regulations and decrees of the British Government theretofore promulgated, all subjects of Great Britain had been inhibited from dealing with German subjects or their agents, or with the goods of German subjects.[18]

As we have previously noted there is nothing in the record to show that the cargo which was tendered for shipment was in fact the property of German subjects.

13. R. p. 29.
14. R. pp. 5, 14.
15. R. p. 16.
16. R. p. 15.
17. R. p. 16.
18. R. pp. 14, 16.

However, the plaintiff, prior to his application for freight space on the "Yucatan", had been placed upon a British blacklist composed of neutrals who did business with German subjects.[19] Because he was blacklisted all British subjects were forbidden by the aforesaid orders in council from doing business with the plaintiff, *and it was for this reason that the defendant's agent refused to accept the plaintiff's application for freight space.*

The defendant, through its British agent, having refused to accept his cargo, the plaintiff brought suit in the United States Court for China and recovered a judgment for $2700,[20] from which judgment this writ of error is prosecuted. The writ of error raises two questions, both of which are questions of pure law. The one involves the jurisdiction of the trial court, the other, the merits of the action. The first contention of the defendant is that the trial court had no jurisdiction over the subject matter of the action inasmuch as its jurisdiction is limited to controversies between citizens of the United States *resident in China,* and does not extend to a controversy between citizens of the United States, one of whom is a non-resident of China, although engaged in business in China, and *therein represented by an agent.*[21] The defendant's second point is that the plaintiff is not entitled to recover because the defendant in its violation of its obligation as a common carrier acted only through a British agent, which was bound by the law of its sovereign to refuse the plaintiff's application.[22]

19. R. p. 17.
20. R. p. 36.
21. R. pp. 50, 51.
22. R. p. 51.

No point is made concerning the amount of damages, so that the case of the defendant is rested entirely upon the establishment of one or both of the two propositions just stated. These propositions, however, may be briefly disposed of.

II.

Argument.

A. THE TRIAL COURT HAD JURISDICTION OF THE SUBJECT MATTER OF THE ACTION.

The defendant in the action appeared and litigated the various issues that were presented, and judgment went against it on the merits. While, therefore, counsel in their brief speak of a lack of jurisdiction of the *person* of the defendant, and while the demurrer interposed by the defendant in the trial court attempted to raise the same point, it is obvious that the trial court did not lack jurisdiction of the *person* of the defendant.

The defendant by appearing in the action and litigating the issues presented by the pleadings submitted its *person* to the jurisdiction of the court. The point that the defendant really urges is that the trial court had no jurisdiction of the *subject matter* of the action because the defendant, although an American citizen, was not a *resident of China.* It is the defendant's contention that the United States Court for China has jurisdiction only of controversies between American citizens *who reside in China* and that it has no jurisdiction where one of the parties does not reside in China,

although he has an agent residing in China. This point necessitates a consideration of the statute creating the United States Court for China. The statute creating that court vested it with exclusive jurisdiction in all cases where jurisdiction at the time of the creation of the court was vested in United States consuls and ministers under *existing law and treaties* between the United States and China.[23]

Section 4085 of the Revised Statutes provides that the jurisdiction of American consuls and ministers shall embrace

> "all controversies between citizens of the United States or others provided for by such treaties respectively".

The treaty with China having to do with consuls and their jurisdiction is the treaty of June 18, 1858.[24] Article XX of that treaty gives to the United States the right to appoint consuls in various parts of China. Article XXVII of the treaty deals particularly with the questions and controversies of which the consuls shall have jurisdiction. It reads as follows:

> "Art. XXVII. All questions in regard to rights whether of property or person, arising between citizens of the United States *in China* shall be subject to the jurisdiction and regulated by the authorities of their own Government. And all controversies occurring *in China* between citizens of the United States and the subjects of any other Government, shall be regulated by the treaties existing between the United States and such Governments respectively without interference on the part of China." (Italics ours.)

23. Act of June 30, 1906, c. 3934, 34 U. S. Stats. at L. 814; U. S. Com. Stats. 1916, Vol. 7, Sec. 7687, p. 8165.
24. 12 U. S. Stats. at L., p. 1029.

It is the defendant's contention that the words "in China" in the first sentence of Article XXVII qualify the word "citizens" and not the word "arising", so that the test of jurisdiction shall be that the parties litigant *reside in China* rather than that the controversy between them *has its origin in China.* Considering the purpose of the treaty, however, it is plain from Article XXVII and from other articles of the treaty that the controversies of which the American authorities were to have jurisdiction under the treaty were controversies *arising in China* between American citizens, irrespective of the residence of the parties litigant. It is plain that the phrase "in China" in the first sentence of Article XXVII qualifies the word "arising" and not the word "citizens". The whole article deals with *controversies arising in China.* The first sentence has to do with controversies between citizens of the United States. The second sentence deals with controversies in which one of the parties is a citizen of the United States and the other the subject of another government. The bare reading of the second sentence is all that is necessary to show that the words "in China" appearing therein fix the place of the origin of the controversy, and not the residence of the parties to the controversy. There being no reason why a different construction should be given to the first sentence, it seems equally clear that the words in the first sentence should likewise be held to fix the place of origin of the controversy rather than the residence of the parties to the controversy. Otherwise a consular court in China would be vested with jurisdiction of a controversy between American citizens *arising in the United States* by the fortuitous circum-

stance that both parties to the controversy might at the time of suit be "in China". This result shows the absurdity of defendant's construction of the treaty provision, an absurdity which becomes even more apparent from a consideration of other provisions of the treaty. Before passing to a consideration of other provisions of the treaty however, it should be noted that the defendant, in strictness, was *in China* at the time that the controversy arose because it was doing business there through its agent and was present by its agent. The controversy between the plaintiff and the defendant was in strictness therefore a controversy arising in China between two American citizens *in China,* the one personally, the other through its representative.

In Article XI of the treaty it is provided that:

> "All citizens of the United States of America *in China* * * * shall receive and enjoy for themselves and everything pertaining to them the protection of the local authorities of Government, who shall defend them from all insult or injury of any sort. If their dwellings or property be threatened or attacked by mobs or incendiaries, or other violent or lawless persons, the local officers on requisition of the consul, shall immediately despatch a military force to disperse the rioters, etc."

It will be noted that this article deals with the rights (in respect of person and property) of "citizens of the United States of America *in China*". Would it be contended that this article of the treaty afforded protection only to the property of American citizens *residing in China,* and gave no security on the part of the Chinese government for the safeguarding of the property of American citizens who engage in business in China

through agents. Is it not clear that the purpose of the article was to protect property *situated in China,* belonging to citizens of the United States, whether the citizens resided in China or not? So also was it not the purpose of Article XXVII of the treaty to provide for jurisdiction of all controversies *arising in China* to which an American citizen was a party?

We submit that the various provisions of the treaty make it clear that it was the purpose to protect *property in China* owned by American citizens, without respect to where those citizens resided, and to invest American consuls with jurisdiction of all *controversies arising in China* between American citizens without reference to the place where those citizens resided. We submit further that even were it necessary for an American citizen to be "in China" in order to entitle him to invoke the provisions of the treaty for the protection of his property and the jurisdiction of his controversies, he is "in China" within the meaning of the treaty *whenever he engages in business in China through an agent who resides in China.* The presence of the agent *in China* will be the equivalent of his principal's presence there for all the purposes contemplated by the treaty.

B. THE FACT THAT THE AGENT OF THE DEFENDANT WAS A BRITISH SUBJECT, FORBIDDEN BY BRITISH RULES AND REGULATIONS AND ORDERS IN COUNCIL FROM DEALING WITH THE PLAINTIFF, IS NO DEFENSE TO THE ACTION.

It is the general rule, well understood and requiring no citation of authority to support it, that a common

carrier, such as the defendant admittedly is, is under obligation to carry the goods of any member of the public who may tender goods for carriage. It is conceded that to this rule there are certain exceptions in favor of the carrier. It may be shown that the carrier was prevented by act of God or a public enemy, *or by some other cause over which it had no control,* from complying with its common law obligation. Any excuse which the carrier has for failing or refusing to comply with its obligation of carriage *is an affirmative defense in proving which the burden of proof is always upon the carrier.* This principle is as well established as the principle that a common carrier is ordinarily obligated to carry all goods that may be tendered to it.

> "If any reason exists excusing a carrier from receiving freight for shipment or for refusing to furnish cars to a shipper, they are matters of defense to be pleaded by the defendant and not the plaintiff."
>
> *1 Michie on Carriers,* Sec. 381, p. 260.

> "In an action against a carrier for failure to furnish cars after demand, an answer failing to allege facts showing that the carrier did perform its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them *were the result of circumstances beyond its power reasonably to control and provide against, is demurrable.*"
>
> *1 Michie on Carriers,* Sec. 381, p. 261.

See, also:

> *Chicago Etc. R. Co. v. Wolcott,* (1895) 141 Ind. 267, 39 N. E. 451.

This was an action against a carrier for failure to provide a shipper with transportation on demand by

him. The defendant contended that the complaint was insufficient because it did not show that no inability on the part of the defendant existed at the time of plaintiff's demand. The court, however, held that this was a matter of affirmative defense, and said (p. 453):

> "If the company were in fact unable to furnish the required cars without undue interference with its business, or with the rights of shippers at other points, that should be shown by the company. The company held itself out to the appellee and the public generally as a common carrier to the several markets named. The complaint alleges that there was no competition against appellant at the shipping points of appellee, and that appellant discriminated against appellee by refusing him cars, and at the same time furnishing cars to others doing business at competing points. We think the allegations of the complaint were quite sufficient on this point; and, if there were any reason why appellant could not furnish cars when demanded, appellant should aver the same by way of answer. *Appellant knew the conditions of its own business much better than appellee could know them.*"

It remains to be seen whether the defendant in the present case has brought itself by *pleading and proof* within these rules, in short whether the defense interposed by the defendant measures up to the requirements of the law. We submit that it does not for two reasons:

1. The tort of the defendant, through its agent, *was not beyond the power of the defendant to control or guard against;* and

2. No act of the British Government could justify the defendant's tort in refusing to accept the plaintiff's goods.

We will discuss these two propositions in the order in which we have stated them.

(1) The tort of the defendant, through its agent, was not beyond the power of the defendant to control or guard against.

To excuse itself from its common law obligation to carry freight the carrier must show that its failure or refusal was due to causes *beyond its power to control.* In the present case it was the duty of the defendant to receive the freight of all persons impartially. The defendant, in order to carry out its common law obligation, was compelled to have an agent who would be under no disability with respect to compliance with the defendant's obligation. The defendant could not employ an agent bound by British law to disregard a right of the plaintiff, and then set up the agent's incapacity as a defense to an action by the plaintiff to redress the violation of the latter's right. If we assume for the moment that a mandate of the British Government operating upon the agent of an American citizen could justify the American citizen in violating its duty toward another American citizen, such only would be the case where the disability of the agent was either (a) unknown to its principal at the time of the agent's tortious act; or (b) had been learned by the principal too late to have permitted a change of the agent.

Neither of these elements is present in the case at bar. *The defendant did not plead, nor did it attempt to prove that it was ignorant of the agent's disability which it urges as a defense.* For all that the record shows the defendant knew of the disability of its British agent, and retained the agent with knowledge of its disability. It should be borne in mind that on the defense which it set up *the defendant had the burden of proof.* It was

not for the plaintiff to show that the defendant had knowledge of the disability of its agent. If lack of knowledge on the part of the defendant entered into the defendant's defense, it was incumbent upon the defendant to plead and prove such lack of knowledge. The defense upon which it relied was an affirmative defense as to which it had the burden of proof, and if, as argued by counsel for the defendant,[25] there is no evidence in the record to show whether or not the defendant had knowledge of the disability of its agent, the defendant must be the sufferer, because thereby it has failed to sustain the burden of proof which the law cast upon it with respect of its affirmative defense.

The bill of exceptions in the record *does not contain any of the evidence introduced on the trial.* We may therefore invoke the rule that every presumption is in favor of a judgment, and that a party attacking a judgment must *affirmatively* show that it is erroneous.[26] In the absence of a bill of exceptions containing the evidence received upon the trial, it will be conclusively presumed that evidence was received which justified the judgment.[27] The plaintiff in error cannot claim that there was no evidence that it had knowledge of its agent's incapacity when *the record upon which it relies does not contain any of the evidence received upon the trial.* In such a case it will be conclusively presumed

25. Br. of Pl. in Er., p. 13.

26. *Williamson v. Richardson*, (1913) 205 Fed. 245 (C. C. A., 9th C.).

27. *Lew Moy v. U. S.*, (1908) 164 Fed. 322 (C. C. A., 9th C.); *Pennsylvania R. Co. v. Glas*, (1917) 239 Fed. 256 (C. C. A., 3d C.); *Vera Cruz & P. R. Co. v. Waddell*, (1907) 155 Fed. 401 (C. C. A., 4th C.); *Nashua Savings Bank v. Anglo-American Co.*, (1901) 108 Fed. 764 (C. C. A., 1st C.), affirmed 189 U. S. 221, 47 L. ed. 782.

in favor of the judgment that evidence sufficient to justify the judgment was received upon the trial.

(a) The defendant had knowledge of its agent's disability, and with such knowledge continued its agency. It cannot therefore rely upon the agent's incapacity.

As we have already stated, the burden of proof was upon the defendant to show its lack of knowledge of the disability of its agent, if it would defeat the plaintiff's claim. Nevertheless, the result would not be otherwise if the burden of proving the defendant's knowledge of its agent's disability were upon the plaintiff.

It is an elementary principle of law, that, in favor of third parties, an agent will be conclusively presumed to have communicated to his principal all matters affecting his agency which have come to his knowledge. Counsel for the defendant admit this principle, but seek to bring the facts of this case within an exception to the principle which may be said to be as well-defined as the principle itself. They argue that, under the facts appearing, the interest of the agent was adverse to that of the defendant, and therefore no presumption arises that the agent communicated the fact of its disability to the defendant. Of course it is essential to the application of the principle that it be shown that there was an adverse interest between the defendant and its agent. This adverse interest, counsel say, arises from the fact that notice of the agent's disability, if communicated to the defendant, might or would have resulted in a termination of the agency and the cutting off of the agent's emoluments. Counsel however overlook the fact that

the agent in all of its transactions with the plaintiff was representing its principal. *The agent was the only person with whom the plaintiff had any direct dealings,* and since in its transactions with the plaintiff the agent represented the defendant, all knowledge which the agent had which affected the transaction with the plaintiff or the subject-matter of the agency will be presumed in favor of the plaintiff to have been communicated to the defendant, *even though the agent's interests might have suffered from such communication.* Whenever an agent represents his principal in a transaction,

> "even though he may have an opposing personal interest, it is his duty, notwithstanding his interest, to communicate to his company (principal) any facts in his possession, material to the transaction, and the law will therefore presume, in favor of third persons, that he made such communication."
>
> *McKenney v. Ellsworth,* (1913) 165 Cal. 326, 329, quoting from Pittsburg v. Whitehead, 36 Am. Dec. 186.

Applying this principle, which is well-established, it will be presumed that when the plaintiff applied to the defendant's agent at Shanghai for freight space on the "Yucatan", the agent, knowing its disability, advised the defendant of the application and of its disability. It then became incumbent upon the defendant, inasmuch as its agent was forbidden to deal with the plaintiff, to appoint another agent or to deal with the plaintiff directly by cable. The plaintiff's first application for freight space was made on May 3d, and

was refused by the defendant's agent.[28] On May 5th a second application was made and was again refused.[29] It was not until May 8th, five days after the plaintiff's first application, that the agent accepted the application, *conditioned upon the approval of the British consul.*[30] It is clear, therefore, that for five days the defendant had it within its power, knowing of the disability of its agent, (because it will be conclusively presumed in favor of the plaintiff that the agent communicated the fact of the plaintiff's application and of its own disability to act upon the application) to appoint another agent not under disability or to deal directly with the plaintiff by cable, and to accept his application for freight space, as by law it was obligated to do. When it failed to do this it directly made a breach of its obligation to carry plaintiff's tendered cargo. It cannot, therefore, defend against the plaintiff's action by imputing the refusal to carry to its agent, when under the law it will be conclusively presumed to have known for five days of its agent's action, and therefore to have ratified such action.

The defendant's claim in the present case is not unlike one advanced by the defendant in *Missouri Etc. Ry. Co. v. Raney,* (1907) 44 Tex. Civ. App. 517; 99 S. W. 589.

The plaintiff in the case cited contracted smallpox, through contact with a ticket agent of the defendant, and sued the defendant for the damage caused thereby.

28. R. pp. 4, 14.
29. R. pp. 4, 14.
30. R. pp. 4, 5, 14.

The defense urged was that the defendant was not liable because there was no *direct* proof that it had knowledge of its agent's condition and knowledge of such condition would not be imputed to it. The court, however, held against this contention, saying in this behalf (p. 590):

> "In our opinion Bridges, at the time appellee was exposed to him, being the ticket agent of appellant and in the discharge of his duties incumbent on him as such agent, and appellee being present for the purpose of transacting business with him in the line of his duties to appellant, and the said Bridges at the time having the contagious disease of smallpox, and knowing that he had it, his knowledge became that of his principal, the railroad company. * * *"

(p. 591):

> "Appellant having notice through its agent, at and prior to the time appellee was exposed to him, that he had the contagious disease of smallpox, and said agent having communicated said disease to appellee and his wife, appellant is liable to appellee for the damages sustained by him as the direct and proximate results of such wrongful act of its agent. The appellant, under the common law, owed to the individuals composing the public who dealt with it the duty to keep them from having contagious diseases communicated to them by its agent while they were dealing with it through such agent."

While it was not claimed in the case that the interest of the ticket agent was adverse to that of the railroad company because he would have lost his position if he communicated the fact of his disease, such a claim would have had as much merit under the facts of the case, as the claim of the defendant in the present case.

(2) No act of the British Government could justify the defendant's tort in refusing to accept the plaintiff's goods.

What we have already said is sufficient to dispose of the case. We have already shown that the defendant has failed in the measure of proof sufficient under any view of the case to make out a defense. *It has failed to show that the incapacity of its agent upon which it relies was not one known to it and suffered by it to continue to the detriment of the plaintiff.* As we have already shown, the plaintiff could not appoint an agent whose legal disability would prevent it from impartially discharging the defendant's obligations to the public, or continue the employment of such an agent with knowledge of its disability, and then interpose the fact of the disability as a defense to an action brought for a tort committed through the agent. The defendant could not through indirection accomplish what the law would not permit it to do directly.

In a larger view of the case, however, the defense of the defendant is insufficient in law. If the defendant had pleaded and proved that it had no knowledge of its agent's disability in time to have permitted it to procure another agent, or directly to accept the plaintiff's application, the plaintiff would nevertheless be entitled to recover upon the broad ground that *no disability of the defendant's agent arising from a law or regulation of a foreign sovereign would be a defense against a breach of the defendant's obligation.* The defendant is a corporation engaged in business as a common carrier. Necessarily it can act only through its agents. It is obli-

gated under the law to deal impartially with all members of the shipping public. In order so to do it is necessary that the defendant have as its agent a person capable of acting impartially. Just as a common carrier is "under a legal obligation arising out of the nature " of its employment to provide suitable and necessary " means and facilities for receiving" [31] goods offered it for shipment over its road, so also it is obligated to have, representing it in its business, persons who are qualified to impartially do its business. The agent through whom the carrier does its business is, to a certain extent, one of the "facilities" of the carrier in the conduct of its business. The defendant in this case was an American citizen, obligated by American law to carry the goods of the plaintiff when offered to it. The fact (if it be the fact) that the goods offered by the plaintiff belonged to German clients of the plaintiff was utterly immaterial. At the time of the transaction in question the United States was preserving toward Germany a status of strict neutrality, and the defendant could not, without violating the letter and spirit of the neutrality of the United States, refuse to accept goods offered to it for shipment by an American citizen, even though those goods were the goods of German subjects. Nay, it could not, without violating the letter and spirit of American neutrality, have refused to accept the goods of German subjects, if offered to it for shipment by the owners themselves.

In fulfilling its obligation to carry, the defendant was required by law to have as its agent a person who was

31. *Covington Stockyards Co. v. Keith*, (1890) 139 U. S. 128, 133; 35 L. ed. 73, 75.

under no legal disability that would prevent him from impartially discharging his principal's obligations. This being so it matters not whether or not the defendant had notice of its agent's disability. If the disability of the defendant's agent existed without the knowledge of the defendant and without any opportunity on the defendant's part to secure an agent not laboring under disability, that fact, while it would relieve the defendant of the stigma of having *wilfully* violated its obligation and the neutrality of its country, would not relieve it from liability to the plaintiff for all the damages which he had suffered from the defendant's default. The fact of the defendant's ignorance, while it would render the defendant guiltless of *intentional* wrongdoing, would do no more than put it upon a parity of innocence with the defendant, and enable the latter to invoke the salutary principle that where one of two innocent persons must suffer from the act of a third person, he must bear the loss who put it in the power of the third person to commit the act which caused the loss. Paraphrasing this principle: where a principal and a third person are equally innocent, and a loss is caused by the act of the principal's agent, the principal, and not the third person, must suffer the loss caused by the agent's act. Directly in point upon this proposition is

Chesapeake & O. Ry. Co. v. Francisco, (1912) 149 Ky. 307; 148 S. W. 46.

A conductor had committed an assault upon a passenger. The passenger sued for damages. The Railroad Company defended upon the ground that at the time of the assault the conductor was insane, *and that*

it was unaware of that fact. Upon the submission of the case to the jury the defendant requested the following instruction (p. 47):

> "If the jury believe from the evidence at the time of the utterance of the abusive words set out in the petition to the plaintiff by Jack O. Johnson, conductor of defendant's train was so far demented or of unsound mind, as not to know the extent of his acts, and the defendant company could not by the exercise of reasonable diligence have discovered his mental condition before the alleged abusive language, then the jury will find for the defendant company."

The trial court refused to instruct as requested, and the plaintiff recovered judgment. Thereupon the defendant appealed, urging that the trial court committed error in refusing the instruction. It will be noted that the defense presented by the railroad company and embodied in the instruction requested by it and refused by the trial court was in principle precisely the same as that of the defendant in the present case. The railroad company claimed that its conductor, through insanity, was under legal disability, and that it could not be liable for a tort committed by him unless it had knowledge of his disability in time to have removed him and employed another conductor. In the case at bar the defendant claims that its agent was acting under a disability created by British law, and that it did not know (or rather that there is no evidence to show that it did know) of the disability in time to employ an agent not laboring under disability. In disposing of the railroad company's contention in the case cited, the court, after pointing out that an insane person is personally liable in compensatory damages for his torts,

upon the principle that where one of two innocent persons must bear a loss, he must bear it who caused the loss, says (page 48):

> "We perceive no good reason why the master should not be held liable for the tort of an insane servant while acting within the scope of his employment, and engaged in attending to the master's business. Though the person injured and the master may both be innocent, yet it is the master's servant who causes the injury, and therefore the master should bear the loss.
>
> Besides, in case of passengers injured by the negligence or tort of one of its employes, a railroad company may not escape liability because it used ordinary care in hiring competent employes. It matters not what degree of care the railroad company may have exercised in this respect; it is still liable for the negligent or tortious act of such employe while acting within the scope of his employment. *Ignorance of an employe's incompetency does not excuse it.* When acting through a conductor as its agent, it is liable for an injury inflicted by him upon a passenger, whether such injury be the result of negligence, willfulness, or unsoundness of mind, and without regard to its inability to discover, by the exercise of reasonable diligence, that his conduct and habits, or his mental capacity, were such as to induce a reasonable belief that such acts would follow."

All of the matter quoted is directly responsive to the defense urged in the present case, and disposes of that defense. The defendant, which acted only through agents, could satisfy its obligation to the public only by the employment of agents who are not laboring under disability; if by reason of any disability under which an agent acted, a wrong was inflicted upon the plaintiff, the defendant cannot impose the consequences of that wrong upon the plaintiff, but must itself bear them, *because the wrong was committed by its own agent.*

(a) In no event can the defendant justify the act of its agent by showing that such act was required by a British law, order or regulation.

As we stated at the outset of this brief, the obligation of a common carrier to carry goods is not absolute. There are certain matters which may excuse a carrier from its obligation to carry. Acts of God, or public enemies, and causes beyond the power of the carrier to control or guard against, may be urged as excuses. The fact that the carrier was prevented by the law of its own country or by war existing in its own country, or in which its own country was a belligerent will excuse the carrier. *Not so, however, with a war to which the carrier's country is not a party.* No foreign war can excuse the carrier's obligations. An alleged impossibility of performance arising from a foreign war is never regarded as sufficient. In *Richards & Co. v. Wreschner*, (1915) 156 N. Y. Supp. 1054 (p. 1057) it is said:

> "The claim of the defendants that they are excused from performance because of the interference with the source of supply or with the opportunity for shipment by reason of the existence of a state of war between Germany and Belgium, and also because of the subsequent illegality of shipment by reason of the proclamation of the German government prohibiting the exportation of the merchandise contracted for, cannot be sustained.
>
> It is well settled that impossibility due to a foreign war is no excuse" (citing numerous cases).

In *Tweedie Trading Co. v. McDonald Co.*, (1902) 114 Fed. 985 (District Court S. D. New York) the court, while recognizing that an impossibility of performance "arising from a governmental act which would render performance illegal, would be an excuse", held that *the*

rule did not contemplate acts of a foreign government, and that no governmental act of a foreign government would excuse performance.

In the present case the defendant was an American citizen chartering an American vessel, and was obligated by law to carry the goods of every American who should tender goods for shipment. Not only that, but the defendant could not, without violating the letter and spirit of American neutrality, refuse to carry the goods of German subjects. Having, in violation of its obligation under American law, refused through its agent to carry the goods tendered to it for carriage by an American citizen, it cannot justify or excuse the violation of its duty by showing that a British law, order or regulation made performance of this duty illegal. The defendant was an American citizen; no British law, order or regulation could affect it in any wise, much less justify it in refusing to fulfill its obligation created by American law.

In fact, a common carrier can never rely upon *a disability of its own agent* to justify a violation of a legal obligation. Causes extraneous to itself may excuse a carrier, but not acts emanating from itself, to wit, a disability of its own agent. This is the rule laid down in

Chesapeake etc. Ry. Co. v. Francisco (1912), 149 Ky. 307; 148 S. W. 46,

to which we referred on page 20, supra, and it is the main ground upon which the trial court in the present case, in a well-reasoned opinion, held the defendant's defense to be insufficient. The opinion of Judge Lobingier on the merits of this case appears in full in the

Record at pages 18 et seq. and merits careful consideration. We subscribe fully to the views of the learned judge therein expressed.

III.

Conclusion.

In view of the foregoing we respectfully submit that the judgment should be affirmed.

Dated, San Francisco,
February 23, 1918.

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